Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,
Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does 12 U.S.C. § 2077 authorize states to tax the income of production credit associations, federally chartered instrumentalities of the United States?

CORPORATE DISCLOSURE STATEMENT AND PARTIES

All parties are identified in the caption to this Petition. Petitioner Production Credit Association of Eastern New Mexico has no parent corporation and no shareholders are publicly traded companies.

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PETITION FOR A WRIT OF CERTIORARI

Production Credit Association of Eastern New Mexico ("PCA") petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

OPINIONS AND ORDERS BELOW

The opinion of the New Mexico Court of Appeals (Pet. App. 1a through 15a) is reported at 999 P.2d 1031 (N.M. Ct. App. 2000). Orders of the New Mexico Supreme Court denying PCA's petition for writ of certiorari (Pet. App. 40a) and denying the subsequent motion for rehearing (Pet. App. 41a) are not reported. The Decision and Order of the New Mexico Taxation and Revenue Department (Pet. App. 16a through 39a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals of New Mexico was entered on February 1, 2000. The Supreme Court of New Mexico denied a timely petition for writ of certiorari to the Court of Appeals of New Mexico on March 13, 2000, and denied a timely motion for rehearing on May 1, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, (art. VI, cl. 2) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 2077 during the period at issue in this litigation provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States or any State, territorial or local taxing authority, except that interest on such obligations shall be subject to Federal Income taxation in the hands of the holder.

STATEMENT OF THE CASE

A. Introduction.

Petitioner PCA is a federally chartered production credit association, a component of the federal Farm Credit System created by Congress. This case is about whether PCA, an instrumentality of the United States, is immune from state taxation under the Supremacy Clause of the United States Constitution (art. VI, cl.2) or whether Congress waived that immunity through 12 U.S.C. § 2077. The New Mexico Court of Appeals correctly held that PCA is an instrumentality of the United States and that federal instrumentalities are inherently immune from state taxation under the Supremacy Clause unless Congress waives the immunity. However, the court went on to hold, incorrectly, that when Congress repealed an express statutory waiver of such immunity in 1985, it nonetheless intended to perpetuate the waiver without expressing that intention in statutory text or related legislative materials. Accordingly, the Court of Appeals held that PCA was not entitled to a refund of New Mexico franchise tax and corporate income taxes paid for the years 1992-1996.

This Court has granted certiorari to decide the materially identical question of whether the National Bank for Cooperatives, another federally chartered instrumentality of the United States that is a component of the Farm Credit System, is immune from state income taxation or Congress waived that immunity. *Director of Revenue v. CoBank, ACB*, No. 99-1972 (*cert. granted* June 26, 2000). This Petition should be held pending the Court's disposition of that case.

B. Federal Farm Credit System.

The Farm Credit System traces its origins to 1916 when Congress enacted the Federal Farm Loan Act, which created twelve regional Federal Land Banks. Pub. L. No. 64-158 (1916). The federal Farm Credit System was organized to

address the failure of commercial banks to meet the credit needs of farmers by providing secured credit at reasonable cost. *See* S. Rep. No. 64-144, at 2-3 (1916). Over the years, Congress amended and reorganized the Farm Credit System several times as agriculture and financial services have changed, the agricultural economy has ebbed and flowed, and flaws in prior versions in the Farm Credit System have surfaced.

During the Great Depression of the 1930's, Congress revamped the Farm Credit System to provide for, among other things, creation of production credit associations such as the one at issue in this appeal. *See*, Farm Credit Act of 1933, Pub. L. No. 73-75, 48 Stat. 257 (1933). Congress' purpose in modifying the Farm Credit System in the 1930's was to provide credit to the farmers and ranchers that commercial lenders either did not offer at all or did not offer on affordable terms.

Congress' reasons for continuing the Farm Credit System to the present day are essentially the same as those that led to its formation more than eighty years ago. As part of the 1971 modernization of the System in the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), Congress reiterated that the original reason for creation of the Farm Credit System was still paramount:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations . . .

Pub. L. No. 92-181, § 1.1, 85 Stat. 583 (1971), codified at 12 U.S.C. § 2001(a).

C. Production Credit Associations.

Congress created production credit associations, such as PCA, in the Farm Credit Act of 1933. *See* Pub. L. No. 73-75, § 20, 48 Stat. 257, 259 (1933). Congress structured production credit associations as limited purpose, federally chartered cooperative lending institutions designed to serve a function of crucial public importance: providing low interest loans to farmers and ranchers for farm and ranch purposes. At the time, Congress examined other methods of providing credit to farmers for farming operations (sometimes called "production credit"). Congress rejected commercial lending because such credit either was not available at all to farmers and ranchers or was available only at such ruinous rates that it would lead to a class of "perpetual debtors." S. Rep. No. 73-124, at 1-2 (1933); H.R. Rep. No. 73-171, at 1-2 (1933). Congress also rejected a centrally administered direct federal program as too expensive to operate, inefficient and insufficiently flexible for local needs. S. Rep. No. 73-124, at 1-2 (1933); H.R. Rep. 73-171, at 1-2 (1933). Instead, Congress created local production credit associations to provide credit locally on a safe business basis and at reasonable cost. S. Rep. No. 73-124, at 2 (1933); H.R. Rep. 73-171, at 2 (1933). The United States initially capitalized and owned all stock in production credit associations, including PCA, though Congress hoped that production credit association earnings could be used to retire stock held by the United States and that they would eventually become locally owned by their borrowers. S. Rep. No. 73-124, at 2 (1933).

The Farm Credit Act of 1933 stated that production credit associations are instrumentalities of the United States. Pub. L. No. 73-75; § 63, 48 Stat. 257, 267 (1933). Notwithstanding changes to the Farm Credit System over the years,

Congress continues to state that production credit associations are instrumentalities of the United States. The Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), which substantially reorganized the Farm Credit System after production credit associations had become borrower-owned, stated in three places that production credit associations continue to be instrumentalities of the United States. *See*, 12 U.S.C. § 2071(a), 2071(b)(7), 2077.

As for state taxation of production credit associations, the initial 1933 legislation stated that production credit associations are federal instrumentalities and that "as such" their income was exempt from state taxation. Pub. L. No. 73-75, § 63, 48 Stat. 257, 167 (1933). The 1933 Legislation, however, expressly waived the production credit associations' Supremacy Clause immunity from state taxation once they retired stock owned by the United States that provided their initial capital. *Id.* By 1968, the United States ceased to own stock in production credit associations, triggering the conditional waiver of immunity provisions. The Farm Credit Act of 1971 comprehensively amended the statutes governing the Farm Credit System, but retained the waiver of immunity from state taxation contained in the Farm Credit Act of 1933. *See* Pub. Law No. 92-181, § 2.17, 85 Stat. 583, 602 (1971).

In 1985, Congress comprehensively restructured the Farm Credit System in response to the risk of insolvency created by loan defaults resulting from a widespread depression in the national farm economy. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678 (1985). Congress determined that the farm economy was in a depression as severe as that of the 1930's. H R. Rep. No. 99-425 (1985). At that time, half of all farmers had negative cash flow and could not meet operating or family living expenses from farm earnings. *Id.* Farm land values (i.e., potential loan collateral) had declined between 30% and 50% since 1981, with economists predicting a further 20% drop by 1987. *Id.*

Because the Farm Credit System was a single industry lender holding about 32% of all farm debt in America, it was under tremendous financial stress. *Id.* In short, Congress perceived a very real threat of a total collapse of the Farm Credit System and the farm economy unless it took drastic steps to shore up its access to capital and financial condition. *Id.* Among other things, Congress provided for an infusion of federal financial assistance into the Farm Credit System. Pub. L. No. 99-205, § 103, 99 Stat. 1678, 1686 (1985) (adding § 4.28J). As part of the 1985 restructuring, Congress also amended 12 U.S.C. § 2077 to repeal the conditional waiver of tax immunity for production credit associations that had been in the Farm Credit Act of 1933 and the Farm Credit Act of 1971. Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 205(d)(16), 99 Stat. 1678, 1705 (1985).

D. Production Credit Association of Eastern New Mexico.

The federal Farm Credit Administration authorized incorporation of PCA as a federal production credit association pursuant to the Farm Credit Act of 1933. The Farm Credit Administration issued it a Farm Credit Administration preprinted set of Articles of Incorporation, dated February 15, 1934. PCA has its principal place of business in Clovis, New Mexico. Pursuant to a "Certificate of District To Be Served," the Farm Credit Administration limited PCA to lending to farmers and ranchers in Quay, Curry, DeBaca, Guadalupe and Roosevelt Counties in New Mexico. The stated corporate purpose for PCA was and is solely to exercise powers granted to it by Congress under the Farm Credit Act of 1933 as it existed or may be amended. PCA lends money for periods of ten years or less. Pursuant to statute, PCA does not lend to the general public, but only to qualified ranchers or farmers. *See*, 12 U.S.C. § 2071.

E. Proceedings Below and Preservation of Federal Question.

At every stage of this dispute, PCA has raised the central issue here: whether the Supremacy Clause bars imposition of New Mexico's corporate income tax and franchise tax on production credit associations because of their status as federally chartered instrumentalities of the United States.

During the years 1992-1996 PCA timely paid New Mexico corporate income and franchise taxes. PCA later timely claimed refunds from the Taxation and Revenue Department of New Mexico (the "Department") for these taxes paid for the years 1992 through 1996. The ground for the claims for refund was that PCA, an instrumentality of the United States, paid taxes it did not owe because it was immune from state taxation under the Supremacy Clause of the United States Constitution, art. VI, cl. 2. *See* Taxation and Revenue Department Decision and Order, No. 98-58. Pet. App. 17a. The Department denied PCA's claims for refund. *Id.* at 17a.

PCA timely filed administrative protests with the Department contesting denial of the claims for refund on the same ground stated in the claims for refund—immunity from state taxation under the Supremacy Clause. *Id.* at 17a. In response to an argument presented by the Department, PCA stated that the 1985 repeal of the express waiver of immunity restored its inherent immunity from state taxation provided by the Supremacy Clause. *Id.* at 33a, 35a.

The Department's internal Hearing Officer decided the consolidated protests upon stipulated facts and denied them on December 21, 1998, in Decision and Order No. 98-58. *Id.* at 16a through 39a. The Hearing Officer acknowledged that because PCA is a federal instrumentality it was immune from state taxation unless Congress has waived that immunity. *Id.* at 33a. The Hearing Officer incorrectly concluded, however, that Congress had tacitly waived that immunity despite its

repeal of the only statutory language granting such a waiver. *Id.* at 33a through 37a. In the Hearing Officer's view, Congress's 1985 repeal of the waiver language should not be understood to "confer an implied immunity from state income taxes" upon production credit associations. *Id.* at 38a.

In a timely appeal to the New Mexico Court of Appeals, PCA argued that the Department should have granted its claims for refund on the ground that the Supremacy Clause rendered it immune from state taxation and that there was no statute waiving that immunity for the tax reporting periods at issue. Court of Appeals Opinion, Pet. App. 1a. through 15a. PCA contended among other things, that the statutory provisions spoke for themselves in providing no waiver of immunity; that Constitutional protections cannot be removed by implication as the Hearing Officer concluded; and, the Hearing Officer was wrong in assuming that an instrumentality of the United States is immune from state taxation only if Congress had affirmatively conferred such immunity. Appellant's Brief in Chief at 15-19, *Production Credit Ass'n of Eastern New Mexico v. Taxation and Revenue Dept.*, 999 P.2d 1031 (N.M. Ct. App. 2000) (No. 20,078).

The New Mexico Court of Appeals affirmed. *Id.* at 15a. The Court of Appeals acknowledged that PCA is a federal instrumentality entitled to Supremacy Clause immunity from state taxation unless Congress waived that immunity. *Id.* at 6a through 7a. However, the court held that when Congress repealed the waiver of state tax immunity in 1985 it did not intend to confer such immunity upon production credit associations. *Id.* at 13a. The Court of Appeals based its conclusion upon Congress' failure to state a reason for the repeal in its legislative history. *Id.* at 12a. Though aware that other jurisdictions had examined the same statutory text and history and held that production credit associations and similar Farm Credit System entities were immune from state

taxation, the Court of Appeals rejected those decisions as "logical but incorrect." *Id.* at 14a.

PCA filed a timely petition for writ of certiorari (discretionary review) in the New Mexico Supreme Court on the issues of: 1) "[w]hether imposition of the New Mexico corporate income tax and franchise tax upon PCA, a federal instrumentality, violates the Supremacy Clause of the United States Constitution, art. VI, cl.2.", 2) "whether Congress authorized the State of New Mexico to impose its corporate income tax and franchise tax upon production credit associations"; and, 3) "whether the Court of Appeals erred by inferring a waiver of constitutional immunity of PCA from state taxation." Petition for Writ of Certiorari to the Court of Appeals at 2, *Production Credit Ass'n of Eastern New Mexico v. Taxation and Revenue Dept.* (N.M., 2000) (No. 26211).

The New Mexico Supreme Court denied PCA's petition in an order dated March 13, 2000. Pet. App. 40a. PCA timely filed a Motion for Rehearing. Motion for Rehearing On Denial of Petition for Writ of Certiorari to the Court of Appeals. *Production Credit Ass'n of Eastern New Mexico v. Taxation and Revenue Dept.* (N.M. 2000) (No. 26211). The New Mexico Supreme Court *sua sponte* extended the period provided for in its rules to consider PCA's Motion for Rehearing, but subsequently denied it in an order filed May 1, 2000. Pet. App. 41a.

REASONS FOR GRANTING THE WRIT

The New Mexico Court of Appeals' determination that Congress silently waived production credit association Supremacy Clause immunity from state taxation in 1985 has serious negative implications for not only the financial condition of production credit associations but also the farm and ranch borrowers who rely on them to provide affordable farm credit. If the New Mexico Court of Appeals is correct, the decision presents a particularly grave problem for

production credit associations and other Farm Credit System entities that may face very large retroactive tax liabilities arising out of their understanding that, as federal instrumentalities, they were immune from state taxation after the Farm Credit Amendments Act of 1985.

The New Mexico Court of Appeals' decision is directly contrary to this Court's longstanding Supremacy Clause jurisprudence. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court established that the Supremacy Clause provides instrumentalities of the United States immunity from state taxation (and other types of state regulation) and that any attempt to impose such taxes upon them is void:

> The great principle is, that the constitution and laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them . . .
>
> We find then . . . a total failure of this [state alleged] original right to tax the means employed by the government of the Union, for the execution of its powers . . .
>
> [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control the operations of the constitutional laws enacted by the Congress to carry into execution the powers vested in the general government . . .
>
> Such a tax must be unconstitutional.

17 U.S. at 426, 430, 435. In the 180 years since the *McCulloch* decision, this Court has held over and over that states may not impose taxes upon "instrumentalities" of the United States because the Supremacy Clause provides an implied immunity. In *Osborn v. The Bank of The United States*, 22 U.S. (9 Wheat.) 738, 865 (1824), the Court held that Supremacy Clause immunity from state taxation is

implied and congressional silence as to immunity did not mean that a federal instrumentality lacked immunity. *Accord, Mayo v. U.S.*, 319 U.S. 441, 445-446 (1943) (rejecting contention that statute is required to confer Supremacy Clause immunity). Numerous cases to the present have held that the Supremacy Clause provides federal instrumentalities implied immunity from state taxation. *See, e.g., United States v. State Tax Comm'n*, 421 U.S. 599, 605 (1975) (state could not impose tax upon sales to military base); *First Agric. Nat. Bank v. State Tax Comm'n*, 392 U.S. 339, 340 (1968) (federally chartered national banks only subject to state sales and use taxes to extent expressly permitted by Congress); *Department of Employment v. United States*, 385 U.S. 355, 358-359 (1966) (federally chartered, supervised and audited Red Cross not subject to state unemployment compensation tax despite the fact that it is not a government agency). Congress is presumed to have been aware of this Supremacy Clause jurisprudence when it enacted the 1985 amendments to Farm Credit System legislation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998).

The New Mexico Court of Appeals' decision violates the well-established rule that Congress may waive Supremacy Clause protections only with express statutory language. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (Congress must provide "clear and unambiguous" authorization for state regulation of federal facilities). *See also, United States v. United Mine Workers*, 330 U.S. 258, 272 (1947) (statutes divesting existing rights or privileges cannot be applied to the United States without express language); *Farm Credit Servs. of Central Arkansas, v. Arkansas*, 76 F.3d 961, 964 (8th Circuit 1996) (express language required to waive immunity of production credit associations), *rev'd on other grounds*, 520 U.S. 821 (1997). Thus, the New Mexico Court of Appeals got it backwards when it held that 1) Congress must grant Supremacy Clause

immunity by statute and, 2) a waiver of that immunity may be implied when the governing statutes are silent.

The decision of the New Mexico Court of Appeals conflicts with the decisions of all other reported state court decisions to consider the effect of the 1985 Farm Credit Amendments Act repeal of express waivers of state tax immunity upon Farm Credit System entities. *Production Credit Ass'n of Southeastern Missouri v. Director of Revenue*, 10 S.W.3d 142 (Mo.2000) (production credit associations and CoBank immune from state taxation), *cert. granted* June 26, 2000; *Arkansas v. Arkansas Farm Credit Servs.*, 994 S.W.2d 453 (Ark. 1999) (production credit associations immune), *cert. denied*, 120 S.Ct. 1530 (2000); *Farm Credit Servs. Of Mid-America v. Department of State Revenue*, 705 N.E. 2d 1089 (Ind. Tax. Ct. 1999) (federally chartered agricultural credit association immune; state argument for implicit waiver and requirement of express statutory constitutional immunity turns Supremacy Clause jurisprudence on its head), *review denied*, Dkt. No. 49S20-9908-TA (Ind. 1999); *Northwest Louisiana Prod. Credit Ass'n v. State*, 746 So.2d 280 (La. Ct. App. 1999) (production credit associations immune); *See also*, *Farm Credit Servs. of Cent. Ark. v. Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996) (production credit associations immune from state taxation), *rev'd on other grounds*, 520 U.S. 821 (1997). In addition, at least two state tax tribunals have held that production credit associations are immune from state taxation. *Appeal of Farm Credit Servs. of Central Kansas*, Dkt. Nos. 1998-2839-DT through 1998-2845-DT (Kan. Bd. Tax. App. 1999); *Utah Prod. Credit Ass'n v. Auditing Div.* App. Nos. 97-0425 and 99-015 (Utah State Tax Comm'n 1999).

Finally, the issue presented by this Petition is not distinguishable in any material way from the issue presented in a case in which the Court recently granted review. On June 26, 2000, the Court granted the Missouri Director of

Revenue's petition for writ of certiorari in *Dir. Of Revenue v. CoBank ACB*, No. 99-1792, in the context of another Farm Credit System institution, CoBank, formerly the National Bank for Cooperatives.

Congress created the National Bank for Cooperatives, just as it created production credit associations, as "a federally chartered instrumentality of the United States and an institution of the Farm Credit System." Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 415, 101 Stat. 1568, 1642 (1988), codified at 12 U.S.C. § 2141(a). *Compare* 12 U.S.C. § 2071(a) (production credit associations). CoBank claimed, just as PCA did below, that it was immune from state taxation under the Supremacy Clause and that Missouri could not lawfully subject it to the State's corporate income tax. The Missouri Director of Revenue, just like the Department in New Mexico, countered that the 1985 amendments to 12 U.S.C. § 2134, which repealed a previous waiver of tax immunity that had been in place for years in which the Governor of the Farm Credit Administration held stock in the banks for cooperatives such as CoBank, was not intended to eliminate the waiver of immunity but rather should be understood as an inconsequential technical change with no substantive effect on the State's freedom to tax. The language and statutory history of 12 U.S.C. § 2134 is nearly identical to 12 U.S.C. § 2077, the provision at issue here. Both once contained conditional express waivers of Supremacy Clause immunity from state taxation. In 1985, as part of the same legislation to reorganize the Farm Credit System, Pub. L. 99-205, 99 Stat. 1678 (1985), Congress repealed the waiver of Supremacy Clause immunity from state taxation for both 12 U.S.C. § 2077 and 12 U.S.C. § 2134. Pub. L. No. 99-205, §§ 205(d)(16) and 205(e)(10), 99 Stat. 1678, 1705 (1985). For the period at issue, Section 2134, after the 1985 repeal of the waiver of immunity, is nearly identical to 12 U.S.C. § 2077:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

The Missouri Supreme Court rejected the Director of Revenue's argument based on the history of 12 U.S.C. § 2134 and held that CoBank was immune from Missouri taxation under the Supremacy Clause.

Missouri's petition for certiorari presented the same question under Section 2134 that this case presents under Section 2077, and relied heavily on the theory that the Missouri Supreme Court's decision was in conflict with the New Mexico Court of Appeals' decision on essentially the same issue. Petition for Writ of Certiorari at 5, 7, 12, 14-15 and Pet. App. A-17 through A-32, *Director of Revenue v. CoBank ACB* (No. 99-1792).

The Court granted the petition in the Missouri case and restated the question presented as follows: "Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?" Neither the issue presented in this Petition, nor the grounds therefor, differ in any material way from the CoBank case that this Court has already agreed to review.

CONCLUSION

The Court should hold this Petition pending its decision in *Director of Revenue v. CoBank ACB* and then act upon it in accordance with that decision.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Docket No. 20,078

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,
Appellant,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Appellee.

Appeal from the New Mexico Taxation and Revenue Department, Gerald B. Richardson, Hearing Officer

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OPINION

PICKARD, Chief Judge.

Production Credit Association of Eastern New Mexico (PCA) filed a claim for refund of New Mexico corporate income and franchise taxes for the 1992-1996 tax years with the New Mexico Taxation and Revenue Department (Department). PCA claimed it was entitled to a refund because (1) Congress declared production credit associations like PCA to be federal instrumentalities, (2) federal instrumentalities are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives their immunity, and (3) Congress did not expressly waive PCA's immunity for the tax years at issue. The Department's internal hearing officer

denied PCA's claim on the grounds that (1) Congress expressly waived the tax immunity enjoyed by privately owned production credit associations in the Farm Credit Act of 1933 and (2) Congress did not intend to confer upon these associations an implied immunity from state taxation by passing the Farm Credit Amendments Act of 1985, which repealed the express tax immunity waiver that had been in place since Congress passed the Farm Credit Act of 1933. We agree with the hearing officer and affirm his decision for the reasons stated below.

BACKGROUND AND PROCEDURAL HISTORY

In 1916, Congress passed the Federal Farm Loan Act (1916 Act). *See* Pub. L. No. 64-158, §§ 4, 12, 39 Stat. 360, 362-64, 370-72 (1916). The 1916 Act established the Farm Credit System (System). *See id.* The System was created for the purpose of providing secured credit to farmers and ranchers at reasonable cost. *See* S. Rep. No. 144, at 2-3 (1916). The System, which then consisted of twelve regional land banks, could make loans only to farmers and ranchers. *See* Pub. L. No. 64-158, §§ 4, 12, 39 Stat. at 362-64, 370-72. The loans had to be secured by first mortgages on farm or ranch property. *See id.* Seven years later, Congress created federal intermediate credit banks for the purpose of making farm and ranch loans that could be secured by something other than first mortgages on farm or ranch lands. *See* Pub. L. No. 67-503, § 202(a)(3), 42 Stat. 1454, 1455 (1923).

In 1933, Congress, in response to the Great Depression, passed the Farm Credit Act of 1933 (1933 Act). *See* Pub. L. No. 73-75, § 20, 48 Stat. 257, 259. The 1933 Act established production credit associations (credit associations) like PCA for the purpose of providing short- and intermediate-term loans to farmers and ranchers. *See* S. Rep. No. 124, at 2 (1933). The United States initially capitalized and owned all the stock in the credit associations. *See id.* Pursuant to statute,

the credit associations were exempt from state taxation while the federal government owned stock in them. *See* Pub. L. No. 73-75, § 63, 48 Stat. at 267. However, pursuant to the same statute, once the federal government's stock was retired, the 1933 Act expressly waived the credit associations' immunity from state income and franchise taxes. *See id.* Congress hoped that the United States' ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. *See* S. Rep. No. 124, at 2.

In order to fulfill its hope, Congress required farmers and ranchers to purchase stock in the credit association from which they were borrowing in an amount equal to 10% of the unpaid principal balance of their respective loans. As part of the loans, sufficient proceeds were generally advanced to the borrowers to purchase the required stock. Congress's hope was realized in the 1960s, by which time the credit associations were owned entirely by the farmers and ranchers who had borrowed money from them. The federal government no longer had an ownership interest in any credit association, nor has it since.

The Farm Credit Administration, which is the federal body responsible for regulating and examining the entities within the System, authorized the incorporation of PCA as a credit association in 1934. As an incorporated and federally chartered credit association, PCA is a statutorily declared federal instrumentality. *See* 12 U.S.C. § 2071(a), (b)(7), § 2077 (1994). PCA's corporate purpose, like that of all other credit associations, is to exercise the powers granted to it by Congress under the 1933 Act as it existed or as it has been amended. Among other things, PCA loans money for periods of ten years or less; does not lend to the general public, but lends only to qualified ranchers or farmers; is not a depository bank; and has no deposit insurance.

In 1971, Congress passed the Farm Credit Act of 1971 (1971 Act). *See* Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971). The 1971 Act made a number of significant changes to the 1933 Act, but retained the tax provisions contained within the 1933 Act. *See id.* The tax provisions in the 1971 Act provided in relevant part:

> Each production credit association and its obligations are instrumentalities of the United States . . . . *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority . . . . The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

Id. (emphasis added).

In 1985, Congress passed the Farm Credit Amendments Act of 1985 (1985 Act). *See* Pub. L. No. 99-205, § 205, 99 Stat. 1678 (1985). The 1985 Act, among other things, repealed the highlighted sentences in the taxation section of the 1971 Act quoted above. *See id.*, § 205(d)(16), 99 Stat. at 1705. As a result, the limited waiver of immunity from state taxation that had been expressly worded in both the 1933 Act and the 1971 Act was not explicitly mentioned in the 1985 Act.

PCA timely filed New Mexico corporate income tax returns and timely paid New Mexico corporate income taxes for the tax years 1992, 1993, 1994, 1995, and 1996. PCA timely submitted claims for refund of all New Mexico income taxes paid for tax years 1992-1996 in the total amount of $343,782. PCA based its claims for refund upon its understanding that, as a federal instrumentality, it is immune

from state taxation pursuant to the Supremacy Clause of the Constitution. After the Department denied its claims, PCA timely filed a protest. In this consolidated proceeding, PCA seeks all amounts claimed as refunds for its 1992-1996 tax years, plus interest thereon, as provided in NMSA 1978, § 7-1-68 (1996).

STANDARD OF REVIEW

The issue presented for our review is whether Congress intended to confer tax immunity upon privately owned production credit associations by passing the 1985 Act, which repealed the express tax immunity waiver contained in both the 1933 Act and the 1971 Act. The parties submitted this issue to the Department's internal hearing officer for consideration upon stipulated facts. Accordingly, we are presented with an issue of law, which we must review *de novo*. *See State v. Ogden*, 118 N.M. 234, 240, 880 P.2d 845, 851 (1994) (ruling that issues of law are reviewed *de novo*); *State v. Romero*, 119 N.M. 195, 197, 889 P.2d 230, 232 (Ct. App. 1994) (ruling that interpretation of statute is an issue of law). In conducting our review, we will not defer to the hearing officer's decision "because it is the function of the courts to interpret the law." *Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995).

DISCUSSION

I. FEDERAL INSTRUMENTALITY

PCA claims it is an instrumentality of the federal government. We agree. The 1933 Act expressly stated that credit associations like PCA are federal instrumentalities. *See* Pub. L. No. 73-75; § 63, 48 Stat. at 267. Although Congress significantly altered the 1933 Act when it passed the 1971 Act, Congress nevertheless maintained the classification of credit associations as instrumentalities of the federal

government in the 1971 Act. *See* 12 U.S.C. § 2071(a) ("Each production credit association shall continue as a Federally chartered instrumentality of the United States."); 12 U.S.C. § 2077 ("Each production credit association and its obligations are instrumentalities of the United States. . . ."). These provisions were not disturbed when Congress passed the 1985 Act, and they remain in effect to this day. In view of the fact that PCA is a federal instrumentality, we next address the consequences that result from PCA's status.

II. IMMUNITY FROM STATE TAXATION

A. Inherent Immunity

PCA claims credit associations, as federal instrumentalities, are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives that immunity. The Department counters that PCA's focus on constitutional immunity is misplaced because

> Congress did not rely on *constitutional* immunity in the original or subsequent Farm Credit Acts or enact a waiver of constitutional immunity. Rather Congress enacted both an explicit *statutory* immunity from state (and federal) taxes and an express statutory exception to that immunity for PCA's no longer federally owned.

In light of its contention, the Department intimates that credit associations like PCA would be subject to state taxation—even though Congress has deemed them to be federal instrumentalities—if not for Congress expressly granting them immunity from state taxation. We disagree with the Department. The Supremacy Clause inherently bars state taxation of federal instrumentalities, *see McCulloch v. Maryland*, 17 U.S. 316, 435-36 (1819), unless taxation is "authorized by Congress," *see First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 340 (1968).

As PCA claims, the now time-honored rule set forth in *McCulloch* has been followed by an unbroken line of Supreme Court decisions. *See, e.g., United States v. Tax Comm'n*, 421 U.S. 599, 605 (1975) (holding that state could not impose tax upon sales to military base); *Department of Employment v. United States*, 385 U.S. 355, 358-59 (1966) (holding that Red Cross as a federal instrumentality is immune from state taxation); *Federal Land Bank v. Board of County Comm'rs*, 368 U.S. 146, 149 (1961) (stating that "a federal instrumentality is not subject to the plenary power of the States to tax"); *United States v. County of Allegheny*, 322 U.S. 174, 176 (1944) ("[S]ince 1819, when Chief Justice Marshall in the *McCulloch* case expounded the principle that . . . instrumentalities of the Federated Government are immune from taxation by [the States], this Court never has departed from that basic doctrine or wavered in its application."); *Osborn v. Bank of the United States*, 22 U.S. 738, 865 (1824) (ruling that congressional silence as to immunity from state taxation of federal instrumentality did not change the fact that it was immune from state taxation); *see also Peisker v. Unemployment Comp. Comm'n*, 45 N.M. 307, 309, 115 P.2d 62, 63 (1941) (stating rule of *McCulloch*). In view of the fact that PCA is inherently immune from state taxation, we must next address whether Congress purposely waived its immunity and whether further legislation was intended to be a return to inherent immunity.

B. Congressional Waiver

The Department's internal hearing officer concluded, and PCA concedes, that Congress expressly waived the inherent tax immunity enjoyed by privately owned credit associations in both the 1933 Act and the 1971 Act. The hearing officer also concluded that Congress did not intend, by passing the 1985 Act, to confer upon these credit associations an implied immunity from state income and franchise taxes. In order to draw this conclusion, the hearing officer looked to the entire

legislative history and congressional intent underlying the 1985 Act.

PCA contends the hearing officer erred by delving into legislative history and congressional intent because the 1985 Act expressly repealed the pre-existing waiver of tax immunity contained within the 1933 Act without qualification or equivocation. According to PCA, under the plain meaning rule, we must give effect to the 1985 Act's language and refrain from further interpretation because its language is clear and unambiguous. *See State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (stating the plain meaning rule).

PCA correctly points out that neither an administrative agency nor an appellate court can resort to legislative history or the principles of statutory construction when the statute in question is clear and unambiguous. However, PCA is mistaken in its contention that a statute that is apparently clear and unambiguous on its face is always subject to the plain meaning rule. As our Supreme Court has stated:

> [C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate . . . differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While . . . one part of the statute may appear absolutely clear and certain to the point of mathematical precision, *lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to*

> *accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object--underlying the statute. See Perea [v. Baca]*, 94 N.M. [624,] 627, 614 P.2d [541,] 544 [(1980)] (courts are permitted to interpret by looking to legislative intent if there is *any doubt* as to the meaning of the words) (emphasis added); *State v. Herrera*, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (statute construed based on perceived legislative object and purpose, rather than on literal language) . . . .

State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (emphasis added).

As we explain below, both the history and background of the 1985 Act, and the apparent conflict between the 1985 Act's wording and the overall legislative intent expressly set out in the 1933 and 1971 acts, give rise to genuine uncertainty as to what Congress was trying to accomplish when it passed the 1985 Act. Consequently, we must search for and effectuate the legislative intent underlying the 1985 Act.

1. 1933 Act and 1971 Act

We first consider the legislative acts that preceded the 1985 Act. In the 1933 Act, Congress expressly stated that it intended for credit associations to lose their immunity from state taxation when the federal government no longer owned stock in them. *See* Pub. L. No. 73-75, § 63, 48 Stat. at 267. In the 1971 Act, Congress continued to evince that intention. *See* Pub. L. No. 92-181, § 2.17, 85 Stat. at 602. In particular, Congress continued to expressly limit the tax immunity enjoyed by credit associations by stating

> [production credit] associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now

> or hereafter imposed by the United States or any State, territorial, or local taxing authority. . . . *The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

See id. (emphasis added). In view of the express language contained in both the 1933 Act and the 1971 Act, we hold that Congress intended to subject privately owned credit associations to state income and franchise taxes prior to passing the 1985 Act.

2. 1985 Act

In the 1985 Act, Congress repealed the two sentences in the taxation section of the 1971 Act that expressly exempted credit associations from state taxation until the federal government no longer held an ownership interest in them. *See* Pub. L. No. 99-205, § 205(d)(16), 99 Stat. at 1705. As a consequence, the express waiver that had appeared in both the 1933 Act and the 1971 Act no longer appeared in the 1985 Act. According to the Department, that result leaves us to consider (1) whether the deletion was intended simply to omit unnecessary language, having no substantive effect, since the waiver exception had completely swallowed the qualified exemption or (2) whether Congress intended a complete about-face on the issue of state taxation of credit associations. As we discuss below, we believe Congress simply intended to omit unnecessary language.

a) Surplus Language

As we stated above, Congress intended to subject privately owned credit associations to state income and franchise taxes under both the 1933 Act and the 1971 Act. Indeed, Congress hoped that the federal government's ownership interest in the credit associations would come to an end at some point and

that the credit associations would eventually become locally owned by their borrowers. *See* S. Rep. No. 124, at 2. Congress's hope was realized in 1968, by which time every credit association was, in fact, privately owned by the farmers and ranchers who had borrowed money from them. It would therefore have been useless, mere surplusage, for Congress to include an express waiver in the 1985 Act. By that time, every court that had had the occasion to address the taxability of privately owned credit associations honored Congress's intent and held in the tax collector's favor. *See, e.g., Woodland Prod. Credit Ass'n v. Franchise Tax Bd.*, 37 Cal. Rptr. 231, 233 (Ct. App. 1964) ("It is difficult . . . to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities."); *Montana Livestock Prod. Credit Ass'n v. State*, 393 P.2d 50, 53 (Mont. 1964); *Columbus Prod. Credit Ass'n v. Bowers*, 180 N.E.2d 1, 2 (Ohio 1962); *Baker Prod. Credit Ass'n v. State Tax Comm'n*, 421 P.2d 984, 985 (Or. 1966) (en banc).

b) Technical Changes

In view of the fact that, by 1985, Congress had evinced its intention to subject privately owned credit associations to state taxation for well over 50 years and that the courts had uniformly supported Congress's power to do so, it would have been a major substantive change in legislative direction to suspend state taxation of such associations. As the Department argues, if Congress intended to make a major substantive change in the way credit associations were taxed by passing the 1985 Act, "one would expect that there would be some mention of the change in the legislative history." And yet there is none. To the contrary, the House Report commentary on Section 205 of the 1985 Act states:

> Section 205 contains numerous *technical and conforming amendments to the provisions of the Farm*

> *Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration.* This section would amend the appropriate provisions of the Act to delete the requirement for specific approval by the Farm Credit Administration of certain activities of the banks and associations and by deleting the general authority of the Farm Credit Administration to supervise System institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the System institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions.

H.R. Rep. No. 425, at 28 (1985).

Thus, neither the 1985 Act nor its written legislative history indicates any intention by Congress to purposefully remove the long-standing waiver of immunity from privately owned credit associations. We agree with the Department that "[i]t is extraordinarily unlikely that Congress would have intended such a marked change in the tax status of PCA's without a single mention of such change in any of the legislative history."

c) Return to Inherent Immunity

PCA's retort to this legislative history and congressional intent analysis is that "the Constitution provides immunity unless waived; and it is clear that the immunity was not waived for the period of PCA's claim for refund." PCA intimates that in light of *McCulloch*, Congress did not and could not legislate out of existence the credit associations' inherent immunity from state taxation under the Supremacy Clause without some current express language doing so. We disagree.

In *McCulloch*, the Supreme Court determined that states lack the power to tax federal instrumentalities due to the Supremacy Clause. *See McCulloch*, 17 U.S. at 435-36. Thus, when Congress is completely silent on state taxation of a federal instrumentality, the Supremacy Clause would bar state taxation. *See Osborn*, 22 U.S. at 865. However, when Congress expresses its intention to subject a federal instrumentality to state taxation, it is obvious that the Supremacy Clause would permit taxation. *See First Agric. Nat'l Bank*, 392 U.S. at 340 (ruling that national banks, as federal instrumentalities, are only subject to state taxation to the extent authorized by Congress).

In the case at bar, Congress expressly waived the state tax immunity of privately owned credit associations since credit associations were first created by the 1933 Act. Although the language waiving the exemption from state taxation was dropped in the 1985 Act, our analysis of the 1985 Act's entire legislative history, both that in the Congressional Record and that shown by the historical background of the legislation, leads us to the conclusion that Congress did not intend to confer tax immunity upon privately owned credit associations in the 1985 Act. We therefore hold that PCA is not immune from the imposition of corporate income tax under the Supremacy Clause of the United States Constitution.

In crafting this holding, we acknowledge that the other courts that have considered the issue now before us for appellate review have ruled that, under the 1985 Act, all credit associations are immune from state taxation. *See, e.g., Arkansas v. Farm Credit Servs.*, 994 S.W.2d 453 (Ark. 1999); *Farm Credit Servs. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999). These courts, without exception, have based their decisions on the well-settled rule that federal instrumentalities retain their inherent immunity from state taxation in the face of Congressional silence. *See Arkansas*, 994 S.W.2d at 455 ("Our federal

government is immune from taxation imposed by the state, unless that immunity is waived, explicitly or expressly, by a statutory waiver of that immunity."); *Farm Credit Servs. of Mid-America*, 705 N.E.2d at 1092 ("The rule that the Supremacy Clause bars state taxation of federal instrumentalities, absent congressional waiver, dates from the U.S. Supreme Court's decision in *McCulloch* . . . .") (footnote omitted). Due to the fact that the 1985 Act fails to expressly waive the tax immunity enjoyed by credit associations, these courts have concluded that such associations are not subject to state taxation. *See Arkansas*, 994 S.W.2d at 456 ("The current version of § 2077, with its silence on the issue [of state taxation], compels a holding of immunity . . . ."); *Farm Credit Servs. Of Mid-America*, 705 N.E.2d at 1092 ("Because Congress has not waived . . . immunity from state taxation, under the Supremacy Clause, Indiana is without power to collect the [tax] from Mid-America.").

In our view, these courts' narrow and exclusive focus on the 1985 Act's language produces a logical but incorrect result. We agree with the courts that if we looked at the law only at the time when PCA was taxed, PCA would be entitled to a refund for the 1992-1996 tax years because the 1985 Act is silent on the issue of state income taxation. Our review of the issue presented on appeal, however, is not confined to a cursory or wooden analysis of the 1985 Act. *See Gallegos*, 117 N.M. at 353, 871 P.2d at 1359 (ruling that it is our responsibility to search for and effectuate the legislative intent underlying the statute in question). After examining the 1985 Act's clear and extensive legislative history, we believe, for the reasons stated above, that Congress has unequivocally evinced its unwavering intention to subject privately owned credit associations to state income taxation. In particular, we are most persuaded by the dissent in *Farm Credit Services v. Arkansas*, 76 F.3d 961,967 (8th Cir. 1996) (Loken, J., dissenting), *rev'd on other grounds*, 520 U.S. 821 (1997). We must give deference to that intention. *See State v. Herrera*, 86

N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (ruling that when a legislative body's perceived legislative intent fails to coincide with a statute's wording, it is the perceived intent, and not the statute's literal language, that we must vindicate).

CONCLUSION

For the reasons stated, we affirm.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD
Chief Judge

WE CONCUR:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE
Judge

/s/ Jonathan B. Sutin
JONATHAN B. SUTIN
Judge

APPENDIX B

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

NO. 98-58

IN THE MATTER OF THE PROTEST OF PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO ID. NO. 01-508114-001, PROTEST TO DENIAL OF CLAIMS FOR REFUND OF CORORATE INCOME TAXES FOR TAX YEARS 1992, 1993, 1994, 1995 AND 1996.

DECISION AND ORDER

This matter comes on for determination before Gerald B. Richardson, Hearing Officer, based upon a stipulation of facts, stipulated exhibits and briefs of the parties. Production Credit Association of Eastern New Mexico, hereinafter, "PCA", was represented by Curtis W. Schwartz, Esq., of Modrall, Sperling, Roehl, Harris & Sisk, P.A. The Taxation and Revenue Department, hereinafter, "Department", was represented by Frank D. Katz, Chief Counsel. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. PCA timely filed New Mexico corporate income tax returns and timely paid New Mexico corporate income taxes for the tax years 1992, 1993, 1994, 1995 and 1996.

2. On April 23, 1996, PCA submitted a claim for refund of all New Mexico income tax paid for its 1992 tax year in the amount of $56,745.

3. On September 9, 1997, PCA submitted claims for refund of all New Mexico income taxes paid for the tax years 1993, 1994, 1995, and 1996 in the total amount of $287,037.

4. PCA based its claims for refund for tax years 1992-1996 upon its understanding that, as a matter of law, it is a federal instrumentality immune or exempt from state income taxation pursuant to the Supremacy Clause of the United States Constitution.

5. The Department did not act on PCA's claim for refund for its 1992 tax year within the 120-day time period provided for by § 7-1-26 NMSA 1978, rendering the claim for refund deemed denied.

6. On September 18, 1996, PCA timely filed a protest to the Department's deemed denial of its claim for refund for its 1992 tax year.

7. On January 26, 1998, in a letter from Mike D. Baca, Supervisor, Corporate Income Tax Unit, to PCA, the Department denied PCA's claims for refund for its 1993 through 1996 tax years.

8. On April 23, 1998, PCA timely filed a protest to the department's denial of its claims for refund for its 1993-1996 tax years.

9. In this consolidated protest proceeding, PCA seeks all amounts claimed as refunds for its 1992-1996 tax years, plus interest thereon, as provided in § 7-1-68 NMSA 1978.

10. PCA is a component of the federal Farm Credit System.

11. The Farm Credit System is a network of farmer and rancher-owned cooperative lending institutions.

12. The lending and financial activities of PCA are under the direct supervision and approval of, and subject to standards prescribed by, the Farm Credit Bank of Texas and, ultimately, the federal Farm Credit Administration.

13. Production credit associations were initially capitalized and owned entirely by the United States, though Congress hoped that production credit association earnings could be used to retire its stock.

14. Congress hoped that as the production credit associations retired government held stock, that they could become local lenders, owned by borrowers.

15. Congress' hope was realized by the 1960's, by which time the production credit associations were owned entirely by borrowers with the United States not having any ownership interest.

16. The Production Credit Association of Eastern New Mexico (PCA) has its principal place of business in Clovis, New Mexico.

17. PCA is a federally chartered corporation incorporated pursuant to the provisions of the Farm Credit Act of 1933.

18. PCA was incorporated pursuant to federal law utilizing a Farm Credit Administration pre-printed set of Articles of Incorporation dated February 15, 1934.

19. PCA was duly chartered on February 27, 1934 as an agricultural credit cooperative pursuant to the provisions of the Farm Credit Act of 1933.

20. The charter was issued by the Farm Credit Administration.

21. Pursuant to federal statute, PCA is a federal instrumentality. 12 U.S.C. §§ 2071(a), 2071 (b)(7), 2077. *See also*, 12 U.S.C. § 2279c(b).

22. The United States Farm Credit Administration chartered PCA in 1934 under its original name, the "Clovis Production Credit Association."

23. PCA subsequently changed its name to the current one, effective March 1, 1984.

24. The corporate purpose for PCA was and is to exercise powers granted to it by Congress under the Farm Credit Act of 1933 as it existed or may be amended.

25. Pursuant to a "Certificate of District To Be Served" issued by the Farm Credit Administration, the Farm Credit Administration limited PCA to lending in Quay, Curry, DeBaca, Guadalupe and Roosevelt Counties in New Mexico.

26. PCA loans money for periods of ten years or less.

27. PCA does not lend to the general public, but only to qualified ranchers or farmers.

28. PCA is not a depository bank and has no deposit insurance.

29. Pursuant to bylaws imposed by the Farm Credit Administration, PCA is authorized to issue Class A and Class B stock with a par value of five dollars.

30. Though its bylaws authorize PCA to offer other classes of common and preferred stock at $5 par value, it has never done so.

31. All PCA borrowers as a requirement of obtaining a loan are required to purchase Class B $5 par voting stock of PCA in an amount equal to 10% of the unpaid principal balance of the loan.

32. As part of the loan, sufficient proceeds are generally advanced to purchase the required Class B Stock.

33. Class B stock is not entitled to dividends.

34. Each holder of Class B voting stock has only one vote in PCA affairs, regardless of the number of shares held. In the case of a joint loan, only one of the joint borrowers may vote, as authorized by the other joint borrowers.

35. Class B stock may be retired at the lesser of par or book value as the loan is paid down, as long as the borrower maintains the prescribed stock-to-loan balance ratio.

36. Alternatively, Class B stock may be converted to non-voting Class A stock also with a par value of five dollars.

37. Class A stock may be retired for the lesser of par or book value.

38. Class A stock is not entitled to dividends.

39. PCA obtains its funds from the Farm Credit Bank of Texas; though until March 1991, it obtained funds from the Farm Credit Bank of Wichita.

DISCUSSION

This case presents the issue of whether New Mexico is permitted under the Supremacy Clause of the United States Constitution to impose income tax upon the income of the Production Credit Association of Eastern New Mexico, hereinafter, "PCA." It is undisputed that PCA, as a production credit association of the federal Farm Credit System, is a federal instrumentality. *See,* 12 U.S.C. §§ 2071(a), 2071(b)(7), 2077 and 2279d(b). PCA argues that its status as a federal instrumentality stands as an absolute bar to state taxation and that no further inquiry is either necessary or proper. The Department argues that not every federal instrumentality is immune from tax, that Congress explicitly waived the exemption from state taxation of production credit associations when the Federal Government no longer owned stock in them, and that even though the language waiving the exemption from state tax was dropped in later amendments of the Farm Credit Act, application of principles of statutory construction leads to the conclusion that Congress did not intend to confer tax immunity upon production credit associations by those amendments.

The Intergovernmental Tax Immunity Doctrine

The immunity of the Federal Government and its instrumentalities from state taxation was first announced in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). In that case, Chief Justice Marshall ruled that the Supremacy Clause prevented Maryland from levying a stamp tax on bank notes issued by the Baltimore branch of the Bank of the United States, a corporation chartered by Congress. This decision contains the now famous dictum by the Court, "[T]hat the power to tax involves the power to destroy; . . .", *Id.* at 431. The Court, recognizing the sovereign power of the states to tax, sought to reconcile the states' taxing power with the recognition in the Constitution that the Constitution is the supreme law of the land. It concluded:

> If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising control in any shape they may please to give it? Their sovereignty is not confined to taxation; that is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

17 U.S. at 431. It thus struck down Maryland's tax because it interfered with the federal banking function established by Congress. The Court also recognized that ultimately, the power to determine the extent of immunity from state taxation and regulation rests with Congress, which is best situated to determine whether a state tax interferes with a federal function, stating:

> In the legislature of the Union, alone, are all represented. The legislature of the Union alone, therefore, can be

> trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.

17 U.S. at 431. Accordingly, since *McCulloch*, the rule with respect to taxation of federal instrumentalities has been that if Congress does not authorize state taxation or regulation, the possibility of interference with substantive federal policy is sufficient to raise a presumption of immunity. *See, Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 865 (1824) which rejected the argument that when Congress is silent, the presumption is in favor of a state's ability to impose a tax on a federal instrumentality.

As the law of intergovernmental tax immunity developed, immunity from state taxation was accorded by the Federal Courts not only to the Federal Government and its instrumentalities, but also to persons dealing with the Federal Government, because the cost of the tax would ultimately be passed on to the Federal Government. *See, Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218 (1928). Beginning with *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), which upheld the imposition of a state tax on a federal contractor building locks and dams, however, the modern trend, with respect to federal contractors, has been to uphold a state tax if it is non-discriminatory and where the legal incidence of the tax is on the private party and not on the Federal Government or agency. *See,* also, *U.S. v. New Mexico,* 455 U.S. 720 (1982).

There has also been litigation over what constitutes a federal instrumentality entitled to state tax immunity. Thus, it has been held that instrumentalities do not include independent contractors, employees or others dealing for their own purposes with the Federal Government, but only those entities, "so assimilated by the government as to become one of its constituent parts." *U.S. v. Township of Muskegon,* 355 U.S. 484, 486 (1958). In this case, because production credit

associations are statutorily designated instrumentalities of the Federal Government, their status as an instrumentality is not in dispute. Because of the rather unique history of congressional enactments addressing their taxability, however, their immunity from taxation is hotly contested by the parties.

The Farm Credit Systems and Production Credit Associations

The Farm Credit System is a nationwide network of farmer and rancher owned cooperative lending institutions designed to serve the credit needs of the agricultural sector. The system began in 1916 with the enactment of the Federal Farm Loan Act which authorized the creation of twelve regional federal land banks. Pub. L. No. 64-158, § 4 (1916). Federal land banks could only make loans secured by first mortgages on farm and ranch property. Pub. L. No. 64-158, § 12. In 1923, Congress created federal intermediate credit banks to make other types of agricultural loans which were not secured by mortgages on farm lands. In 1988, federal land banks and federal intermediate credit banks were merged into farm credit banks. Pub. L. No. 100-233, Title IV, § 410 (1988).

Production credit associations were created by Congress in the Farm Credit Act of 1933 to provide short to intermediate term loans to ranchers and farmers. Pub. L. No. 73-98, § 20 (1933). Production credit associations were created during the Great Depression in response to the failure of commercial banks to provide adequate and affordable credit to farmers and the inefficiencies, costs and inflexibility of centralized government lending programs. S. Rep. No. 124, 73rd Congress, 1st Session, at 2 (1933). As stated in the Senate Committee on Banking and Currency Report on the legislation:

> The policy of this bill is to provide the stimulus in the form of Government capital and supervision to the establishment of local institutions in which farmers are participants and owners and through which necessary

> credit may be provided on a safe business basis and at reasonable cost.

S. Rep. No. 124, 73rd Cong., 1st Sess at 2 (1933). Production credit associations were initially capitalized and owned entirely by the Federal Government, but Congress hoped that earnings of the associations could be used to retire stock held by the Government so that they would eventually be owned entirely by their own members and borrowers. *Id.* In fact, by 1968, all production credit associations were owned entirely by their borrower-members. *See*, H.R. Rep. No. 593, 92nd Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 2091, 2098. At their creation, production credit associations were organized, chartered and regulated by the Governor of the Farm Credit Administration. Pub. L. No. 73-98, § 20. They remain subject to the regulation of the Farm Credit Administration, an independent agency of the Executive Branch of the Federal Government responsible for the regulation and examination of entities within the Farm Credit System. *See*, 12 U.S.C. §§ 2252 and 2241. The Farm Credit System and the Farm Credit Administration were reorganized by Congress by the Farm Credit Amendments Act of 1985, Pub.L. 99-205. One of the purposes of these amendments was to lessen the Government's day-to-day control of the Farm Credit System.

> The Farm Credit Administration would abandon past practices that amounted to day-to-day participation in management of the System activities and would become an arm's length regulator like other similar federal agencies. . . . Stronger federal oversight and regulation of the System will result in cutting the principal organizational ties between the Farm Credit Administration, the regulator, and the Farm Credit System banks and associations.

H.R. Rep. No. 425 at 3,12, 1985 U.S.C.C.A.N. at 2589, 2598. These changes recognized that the banks and associations,

including production credit associations, were no longer owned by the Federal Government. Thus, they were to be treated as independent, but regulated entities. The governing structure of the Farm Credit Administration was also modified. The Farm Credit Administration had been directed by a part time board that chose a full-time governor to run the agency. The 1985 Act, however, shifted the management of the Farm Credit Administration to a full time, three member presidentially appointed board, which became more of an arm's length regulator of the Farm Credit System institutions, and references to the Governor of the Farm Credit Administration were removed from the laws concerning production credit associations. *See*, H.R. Rep. No. 425 at 3 and 28, 1985 U.S.C.C.A.N.at 2589 and 2616.

The Legislative History of the Taxability of Production Credit Associations

Commencing with the legislation creating production credit associations in 1933, Congress chose to expressly provide guidance with respect to the extent to which the associations, and their property and obligations would be taxable. Specifically, it chose to limit the immunity from taxation which would otherwise be accorded a federal instrumentality, providing as follows:

> The Central Bank for Cooperatives, the Production Credit Corporations, *Production Credit Associations*, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds and other such obligations issued by such banks, *associations*, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local

> taxing authority. *Such banks, associations or corporations, their property, their franchises, capital, reserves, surplus and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial or local taxing authority; except that any real property and any tangible personal property and any tangible property of such banks associations and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired,* or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired.

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (emphasis added). Thus, from the outset of their creation, the exemption from state income taxation accorded to production credit associations was expressly stated and expressly limited to periods in which some portion of the stock of an association was owned by the Production Credit Corporation, a federally chartered and owned corporation created by the same Farm Credit Act of 1933 to capitalize production credit associations.

Although Congress made a number of changes in the Farm Credit System in the Farm Credit Act of 1971, and although there were no production credit associations entitled to income tax immunity, because all such associations were now owned entirely by their members, the provisions were retained which limited the income tax immunity of production credit associations to those which still had some portion of their stock owned by the Governor of the Farm

Credit Administration. As amended by the 1971 Act, these provisions read as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inherintance and gift taxes) now and hereafter imposed by the United States, any state, territorial or local taxing authority. *Such associations, their property, their franchises, capital reserves, surplus, and other funds and their income shall be exempt from all taxation now and hereafter imposed by the United States and any State, territorial or local taxing authority; except that interest on the obligations of such associations shall be subject only to federal income tax in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and personal property of such associations shall be subject to federal, State, territorial and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

Farm Credit Act of 1971, Title II, § 2.17, complied at 12 U.S.C. § 2077 (emphasis added).

In 1985, as part of the amendments enacted by the Farm Credit Amendments Act of 1985, the last two sentences of 12 U.S.C. § 2098, which are italicized in the quotation directly above, were removed from the statute. Pub. L. 99-205, Title II, § 205(e)(16), 99 Stat. 1678, 1705 (1985). Thus, the language providing for income tax exemption and the language qualifying the income tax exemption to instances where the the stock in a production credit association is held

by the Governor of the Farm Credit Administration was removed.

There is nothing in the legislative history of the 1985 amendments to indicate that Congress, by removing the language concerning the limited immunity of production credit associations from taxes on their income, property, funds and reserves, intended to confer broad and unlimited tax immunity on such associations, beyond the immunity for their notes, debentures and other obligations conferred by the first sentence of 12 U.S.C. § 2077. Rather, with reference to Section 205, which contained these amendments, the House Report states:

> [Section 205] contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration. This section would amend the appropriate provisions of the Act to delete the requirement for specific approvals by the Farm Credit Administration of certain activities of the banks and associations by deleting the general authority of the Farm Credit Administration to supervise System institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the system institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions.

H.R. Rep. No. 425 at 28, 1985 U.S.C.C.A.N. at 2615. Thus, the amendments are described as technical and conforming amendments, intended to be consistent with the purpose of the 1985 Amendments Act to change the management function of the Farm Credit Administration to being a regulator rather than day-to-day manager of production credit

associations. There is no mention of any tax implications whatsoever.

Are Production Credit Associations exempt from income taxation by virtue of their status as a federal instrumentality?

The issue of the state tax immunity of production credit associations first arose after the 1985 amendments to the Farm Credit Act. Four production credit associations in Arkansas brought suit in the United States District Court of the Eastern District of Arkansas seeking declaratory judgment and injunction that they were exempt from Arkansas sales and income taxation. The District Court granted summary judgment on behalf of the production credit associations based upon their status as federal instrumentalities whose immunity from state taxation was not expressly waived by Congress. Arkansas appealed, raising the same arguments the Department raises herein. The Court of Appeals affirmed by a divided panel. *Farm Credit Services of Central Arkansas, PCA v. State of Arkansas,* 76 F.3d 961 (8th Cir. 1996). The majority opinion concluded, as did the District Court below, that because the federal statutes no longer contained an express waiver of the Production Credit Associations' implied immunity as federal instrumentalities, they were immune from Arkansas taxes. *Id.,* at 964. Judge Loken wrote a dissenting opinion, stating that Congress was best qualified to balance the competing interests involved in applying the doctrine of intergovernmental immunity to federal instrumentalities and that the application of normal rules of statutory construction could lead only to the conclusion that the 1985 technical amendments were not intended to confer an implied constitutional immunity from tax. *Id.,* at 965-967.

The Supreme Court granted certiorari and reversed the Court of Appeals. *Arkansas v. Farm Credit Services of Central Arkansas,* __ U.S. ___, 117 S.Ct. 1776 (1997). It did not reach the issue of whether production credit associations

were immune from state tax under the Supremacy Clause. Rather, it held that the Federal District Court lacked subject matter jurisdiction to determine the issue of immunity from state tax because of the operation of the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Court recognized that the Tax Injunction Act was a congressional statement with respect to the balance of powers between the States and the Federal Government that federal courts should not interfere with the ability of the States to define and elaborate their own laws and administrative processes, especially in an area as important as taxation, which is a power held concurrently by the States and the Federal Government. *Id.*, 117 S.Ct. at 1779-1780. Although the only exception to the jurisdictional bar contained in the Tax Injunction Act is where a plain, speedy and efficient remedy is not available from the state courts, the Court has recognized that under our constitutional system, the Federal Government has sovereign interests which it must be allowed to protect. Thus, the Court has also recognized an exception to the jurisdictional bar of the Tax Injunction Act when the United States sues to protect itself or its instrumentalities from state taxation. *Department of Employment v. United States,* 385 U.S. 355, 358 (1966). In the *Department of Employment* case, however, the United States was a co-plaintiff with the federal instrumentality, the Red Cross, in challenging the imposition of a state tax. In the litigation involving the four Arkansas production credit associations, they sued on their own. Thus, the issue before the Supreme Court in the *Arkansas v. Farm Credit Services* case was whether federal instrumentalities fall under the exception to the Tax Injunction Act when they sue without the United

States as co-plaintiff. In concluding that the federal instrumentality status of production credit associations is not sufficient for them to escape the prohibition of the Tax Injunction Act, the Court distinguished production credit associations from the United States or its agencies, such as the National Labor Relations Board, stating:

> Whatever may be the rule under the Tax Injunction Act where a federal agency or body with substantial regulatory authority brings suit, PCA's [Production Credit Associations] are not entities of that description. PCA's are not granted the right to exercise government regulatory authority but rather serve specific commercial and economic purposes long associated with various corporations chartered by the United States.
>
> * * * *
>
> The PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB [National Labor Relations Board] or any of the departments or regulatory agencies of the United States. This sufficies for us to conclude that instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act.

Id., 117 S.Ct. at 1782.

After the Supreme Court reversed the lower court determinations that the Arkansas associations were immune from Arkansas income and sales taxes, suit was brought in the Chancery Court of Pulaski County, Arkansas by the same

production credit associations to determine the issue of tax immunity. On July 1, 1998, the Chancery Court granted summary judgment to the associations. The Chancery Court ruled on the same basis as the majority of the Eighth Circuit Court of Appeals panel, that in the absence of an express congressional waiver of immunity, production credit associations are immune from Arkansas' taxes based upon their federal instrumentality status. The decision is unreported but is contained in the record herein. *Farm Credit Services of Central Arkansas, PCA, et al. v. State of Arkansas,* Chancery Court of Pulaski County Arkansas, No. 94-4931.

The Department draws from the language of the Court in *Arkansas v. Farm Credit Services of Central Arkansas,* quoted on page 16, herein, which strongly distinguished the activities and powers of production credit associations from those of the Federal Government, to argue that the federal instrumentality status of production credit associations, in and of itself, should not immunize them from state income taxation. In support, the Department cites to the following language from the Supreme Court's opinion in *United States v. New Mexico*, 455 U.S. 720 (1982):

> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, *or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.*

455 U.S. at 735, 102 S.Ct at 1383 (emphasis added). The Department thus argues that the result in the *Arkansas Farm Credit Services* case, which effectively held that all federal instrumentalities are not so closely aligned with the Federal Government to support granting them the same exemption from the jurisdictional bar of the Tax Injunction Act, and the language from *U.S. v. New Mexico* which appears to limit the

tax immunity under the Supremacy Clause to instrumentalities which are closely aligned with the Federal Government, demonstrate that the Supreme Court has drawn away from the concept of absolute tax immunity based solely upon federal instrumentality status.

PCA correctly points out that the language with respect to federal instrumentalities quoted from *United States v. New Mexico* is dicta, since it is undisputed that the entities taxed in that case were federal contractors, and not federal instrumentalities. While the trend in twentieth century federal jurisprudence with respect to intergovernmental tax immunity has clearly been to narrow the breadth of the tax immunity of entities associated with the Federal Government, and while courts often use dicta to foreshadow trends in jurisprudence, the fact remains that there are no reported decisions which have restricted the immunity of federal instrumentalities based upon an insufficient congruency in the activities and powers of the instrumentality and the Federal Government itself. The State of Arkansas raised the identical argument in its dispute with the Arkansas Production Credit Associations and the argument was rejected by both the Eighth Circuit Court of Appeals and the Chancery Court of Pulaski County, Arkansas. In the absence of any authority which distinguishes the tax immunity of federal instrumentalities based upon how closely their activities are connected to those of the Federal Government, the Department's argument must be rejected.

This leaves us with the primary issue presented by this case. PCA argues that federal instrumentality status is talismanic with respect to immunity from state taxes in the absence of congressional authorization to tax. PCA maintains that because the the 1985 amendments to the Farm Credit Act removed the congressional authorization, the imposition of state income tax is clearly prohibited by a line of federal jurisprudence unbroken since *McCulloch v. Maryland, supra.* The Department argues that it would ignore congressional

intent to apply immunity from state income taxes to production credit associations given the legislative history of the federal statutes addressing the tax immunity of those entities.

Were we to engage in an effort to discern congressional intent behind the 1985 amendments to Section 2077, I have no doubt that Congress did not intend to confer state income tax immunity upon production credit associations by the amendments. Since at least 1968, there have been no production credit associations immune from state income taxes under the language omitted by the 1985 amendments because there were no longer any production credit associations whose stock was wholly or partially owned by the Federal Government. The House Report on the amendments makes no reference to the removal of the language addressing exemption from tax, referring to the amendments as merely "technical" and "conforming" amendments consistent with the purpose of the 1985 amendments to restructure the Farm Credit Administration. Thus, the reference to the "Governor of the Farm Credit Administration" in the last sentence of Section 2077, which limited the exemption from tax to production credit associations whose stock was held by the Governor of the Farm Credit Administration was no longer needed because the amendments restructured the Farm Credit Administration and did away with the Governor's position.

Not only were there no production credit associations that qualified for the waiver of tax immunity contained in Section 2077 when the language conferring it was removed in 1985, but that waiver of immunity had been part of the federal statutes since production credit associations were created by the Farm Credit Act of 1933. In fact, the federal scheme with respect to taxation of production credit associations had never relied upon the implied tax immunity conferred upon federal instrumentalities to confer such tax immunity. Since their

creation, Congress provided an express statutory exemption from tax for production credit associations and limited the exemption to those production credit associations which were either partially or wholly owned by the Federal Government. It would defy all logic to conclude that somehow, by removing an exemption from tax and a limitation on that exemption that had been part of the federal scheme for production credit associations for more than fifty years, but was no longer applicable, that Congress intended to create an implied common law tax immunity which had never been part of the federal scheme from the outset. To further conclude that Congress did this without a single mention or acknowledgement of this result anywhere in the legislative history pushes legal reasoning beyond reason and into the realm of absurd and unintended results.

We are thus left to choose between two legal doctrines, both of which are so well established and founded upon sound legal reasoning as to be beyond challenge as to their propriety, but which lead to diametrically opposing results. PCA argues that *McCulloch v. Maryland* and 179 years of unwavering federal jurisprudence under the Supremacy Clause dictates that the imposition of New Mexico's tax be barred. The Department argues that this result in contrary to the intent of Congress behind the 1985 amendments to the Farm Credit Act and that in construing the effect of amendments to statutes, the legislative intent must govern our determination. While both sides have done an excellent job in arguing the merits of their respective positions, neither have presented a conceptual basis which can reconcile the two conflicting legal doctrines and provide a persuasive basis as to which approach should govern this determination. For that matter, the parties in the parallel litigation in the federal courts and now the courts of Arkansas have similarly failed to come up with an approach which provides a rationale to harmonize the conflicting approaches to the resolution of this issue.

To resolve this quandry, we must examine the conceptual underpinnings of the federal instrumentality tax immunity doctrine and examine the appropriateness of applying the doctrine to the facts of this case. We must bear in mind that from the outset, the doctrine of immunity for federal instrumentalities has been a doctrine of *implied* immunity. As noted by Professor Tribe in his discussion of the development of the intergovernmental immunity doctrine:

> *McCulloch* thus announced the prophylactic per se rule that has been followed ever since. If Congress does not authorize state taxation or regulation of Federal instrumentalities, *the possibility of interference with substantive federal policy is sufficient to raise a presumption of immunity.*

Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L.R. 682, 701 (1976)(emphasis added). Thus, immunity is implied because of a presumption of interference in the absence of a congressional expression which addresses the state-federal balance.

One is led to inquire, then, on what conceptual basis can we apply a doctrine of intergovernmental tax immunity whose underpinnings rest upon an implied immunity based on congressional silence to federal instrumentalities whose tax immunity was *never* dependent upon such implied immunity? As noted earlier herein at pp. 10-13, since their creation, the tax immunity of production credit associations was expressly stated and expressly limited by explicit congressional enactments. Even to this day, the exemption from taxation for the notes, debentures, bonds and other obligations of production credit associations remains express, rather than implicit. 12 U.S.C. § 2077. Congress has not been silent with respect to the taxability of production credit associations. Under these circumstances, it makes no sense to blindly apply

a doctrine of implied immunity developed and intended to apply when Congress has been silent, to create an immunity from state income taxes which the legislative history of the applicable federal statutes clearly demonstrates was never intended to apply to privately owned production credit associations. Rather, we should look to the congressional intent behind the 1985 amendments to determine whether Congress intended to confer an immunity from state income taxes upon privately owned production credit associations. If we do so, it is clear that no such intent to confer immunity existed.

Although it is noted that this approach to the tax immunity of production credit associations relies upon distinguishing the treatment of these federal instrumentalities from those where there has not been an express congressional waiver of immunity and a subsequent amendment to that waiver, this approach to the issue of intergovernmental immunity does no violence to the underlying concept of implied immunity. Since *McCulloch v. Maryland,* the Court has noted that Congress is best situated to determine the circumstances under which a state tax interferes with the execution of federal policy, *Id.,* 17 U.S. at 431, and in the absence of such a determination, immunity would be implied. In this case, where Congress stated that there would be no state income tax immunity for privately owned production credit associations, it does no violence to the balance of power between the States and the Federal Government to look to the intent of Congress when it enacted the 1985 amendments to the Farm Credit Act to determine whether Congress intended to confer a level of state tax immunity which had not heretofore existed for privately owned production credit associations.

CONCLUSIONS OF LAW

1. PCA filed timely protests to the Department's denials of its claims for refund of corporate income tax for the 1992-

1996 tax years and jurisdiction lies over both the parties and the subject matter of this protest.

2. PCA is a federal instrumentality.

3. Since the creation of production credit associations by the Farm Credit Act of 1933, Congress expressly waived the immunity of privately owned production credit associations from the imposition of state income taxes upon their income.

4. Congress did not intend, by the enactment of the Farm Credit Amendments Act of 1985, to confer an implied immunity from state income taxes for privately owned production credit associations.

5. PCA is not immune from the imposition of New Mexico Corporation Income Tax under the Supremacy Clause of the United States Constitution.

For the foregoing reasons, the protest of PCA IS HEREBY DENIED.

DONE, this 21st day of December, 1998.

/s/ Gerald B. Richardson
GERALD B. RICHARDSON
Hearing Officer
Taxation and Revenue
Department
P.O. Box 630
Santa Fe, New Mexico 87509-0630

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision and Order were served upon the parties by mailing a copy to the counsel for PCA, Curtis W. Schwartz, Esq., Modrall, Sperling, Roehl, Harris & Sisk, P.A., PO Box 9318, Santa Fe, NM 87504-9318 and hand-delivering a copy to David Iglesias, Chief Counsel, NM Taxation and Revenue Department, all on this 21st day of December, 1998.

/s/ Gerald B. Richardson
GERALD B. RICHARDSON

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

[Monday, March 13, 2000]

No. 26,211

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,

Petitioners,

vs.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondents.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, amici briefs and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeal number 20078.

ATTEST: A True Copy

KATHLEEN JO GIBSON
Clerk of the Supreme Court

By: Jane Gurulé
JANE GURULÉ
Chief Deputy

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

[Monday, May 1, 2000]

No. 26,211

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,

Petitioners,

vs.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondents.

ORDER

This matter coming on for consideration by the Court, upon Motion of petitioner for rehearing and the Court having considered said motion and additional authority, and being sufficiently advised, Chief Justice Pamala B. Minzner, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Patricio M. Serna, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

ATTEST: A True Copy

KATHLEEN JO GIBSON
Clerk of the Supreme Court

By: Jane Gurulé
JANE GURULÉ
Chief Deputy

Supreme Court, U.S.
FILED
AUG 28 2000
CLERK

(2)

No. 00-156

In The

Supreme Court of the United States

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,

Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New Mexico

BRIEF IN OPPOSITION

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19pp

QUESTION PRESENTED

Did Congress intend to eliminate the States' long-standing authority to tax privately-owned Production Credit Associations when it amended 12 U.S.C. § 2077 in 1985?

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STATEMENT OF THE CASE

At issue in this case is whether the implied intergovernmental tax immunity doctrine first articulated in *McCulloch v. Maryland*, 17 U.S. (4 *Wheat.*) 316 (1819) should prohibit the States from taxing privately-held Production Credit Associations ("PCAs") absent an explicit authorization to tax, where Congress' intent to allow such taxation can be fairly inferred from commonly-accepted principles of statutory construction and the legislative history of the Farm Credit Act of 1933, 48 Stat. 257.

The New Mexico Court of Appeals correctly held that the intergovernmental immunity doctrine should not be applied blindly in these circumstances, and instead looked to Congress' intent in determining that PCAs were not immune from state taxation. *Production Credit Association of Eastern New Mexico v. Taxation and Revenue Department*, 999 P.2d 1031 (N.M. Ct. App. 2000). This same question (concerning "Banks for Cooperatives," also established by the Farm Credit Act of 1933) is currently pending before the Court in the case of *Director of Revenue v. CoBank, ACB*, No. 99-1972 (*cert. granted*, June 26, 2000). Because the question presented in that case is essentially identical to the question raised here, the Court should stay action on this Petition until a decision is rendered Case No. 99-1972 and deny certiorari at its conclusion, or alternatively, accept certiorari in this case and affirm the decision of the New Mexico Court of Appeals.

A. History of the Production Credit Associations

The Farm Credit System traces its roots to the establishment of Federal Land Banks in 1916. 39 Stat. 360 (1916). From the earliest history of the Farm Credit System, it is apparent that Congress carefully considered the tax status of the various member institutions with respect to federal, state and local taxes. Significantly, Congress allowed the imposition of state and local property taxes on the Federal Land Banks even while federal property was exempt. 39 Stat. 360 (1916).

In an effort to increase the amount of capital available to farmers during the Great Depression, Congress enacted the Farm Credit Act in 1933, creating publicly-owned Production Credit Associations ("PCAs") and Banks for Cooperatives ("BFCs"). The enabling legislation for both types of institutions provided a mechanism for eventual private ownership, by requiring borrowers to take stock in the lending institutions as part of any loan. By 1968, Congress had achieved its goal of ending the public ownership of the PCAs and the BFCs. See, H.R. Rep. No. 593, 92nd Cong., 1st Sess. (1971), 1971 U.S.C.C.A.N. 2091, 2098.

When Congress created the PCAs, it spelled out their tax status in considerable detail. First, Congress specified that the PCAs and its obligations should be considered federal instrumentalities, *and as such* the notes, debentures and bonds of the PCAs should be exempt from federal, state and local taxes (except estate, inheritance and gift taxes). Congress went on to provide a broad exemption from local, state and federal taxes (except for property taxes on real and tangible property) so long as

the federal government held an ownership interest in the PCAs. Once the ownership interest ended, the states were free to tax the PCAs on the same basis as other for-profit ventures. The Banks for Cooperatives were subject to the same conditional exemption. 48 Stat. 257, 267. The conditional tax exempt status of these two institutions should be contrasted with the tax exemption provided to two other lending institutions created by the Farm Credit Act of 1933, Farm Credit Banks (12 U.S.C. § 2023), and Federal Land Bank Associations (12 U.S.C. § 2098). Those institutions were provided with a broad exemption from all taxation except property taxes on real and personal property.

In 1971 the Farm Credit Act was substantially amended, but the differing tax treatment afforded to the component entities of the Farm Credit System remained unchanged.

In 1985, Congress made significant changes in the Farm Credit System in response to an on-going farm crisis. Farm Credit Amendments Act of 1985, 99 Stat. 1703-1707 (1985). A major objective of the legislation was to reduce the involvement of the Farm Credit Administration in the day-to-day operations of the member institutions of the Farm Credit System, and to strengthen its role as a regulator of the institutions. H.R. Report No. 425, 99th Cong., 1st Sess. 11, 1985 U.S.C.C.A.N. 2587. One piece of that legislation was a "technical and conforming" amendment which struck numerous outmoded references to the "Governor of the Farm Credit Administration" and which amended 12 U.S.C. § 2077 to eliminate both the PCAs' statutory exemption from tax and that exemption's

conditional phase-out provision for publicly-owned PCAs. Because the stock of all PCAs had been privately held since 1968, both the exemption and its phase-out provision were now surplusage. The exception had long-since swallowed the rule.

B. The Decision Below

The New Mexico Court of Appeals held that PCAs were instrumentalities of the United States, and were therefore entitled to implied immunity from state and local taxation unless the same had been waived. Petition pp. 6a-7a. The court went on to hold that the provisions of 12 U.S.C. § 2077 were ambiguous in light of the express language contained in the 1933 and 1971 Farm Credit Acts where Congress expressed its intent to subject privately-held PCAs to state and local taxation. *Id.* at 9a-10a. The court concluded that Congress' intent in eliminating the last two sentences in 12 U.S.C. § 2077 was simply to eliminate surplus language, since all PCAs had been privately held since 1968. The court also found that the legislative history of Pub. L. 99-205, indicating Congress intended to make only "technical and conforming" amendments to the 12 U.S.C. § 2077, coupled with the absence of any mention of reversing a fifty-year policy of allowing state taxation in House Report No. 425, negated any inference that Congress intended to reinstitute state tax immunity. *Id.* at 11a-12a. Most significantly, the court below concluded that *McCulloch* should apply only when Congress has been silent on the issue of state taxation; where Congress has spoken, it is up to the courts to ascertain Congress' intent. *Id.* at 13a. The court concluded that Congress has "unequivocally evinced its unwavering

intention to subject privately owned credit associations to state income taxation." *Id.* at 14a.

C. Misstatements of Fact

Petitioner warns that if the decision below stands it will have "serious negative implications" for the financial condition of not just the PCAs, but also for farmers and ranchers who rely on them for loans. Petition, p. 10. There is no foundation for this claim in the record. No evidence has been tendered that the PCAs are in any financial peril.[1] The argument is counter-intuitive at best, since the income taxes at issue here are imposed only on net profits. The PCAs could reduce or eliminate any state income tax liability simply by lowering the interest rates they charge to the farmers and ranchers who borrow from them. Petitioner further warns (Petition, p. 11) of the potential for "very large retroactive tax liabilities" if the decision below is not reversed. That claim is also highly speculative. The Petitioner in this case, as in other reported PCA cases, seeks a refund of taxes previously paid. *See, e.g, Farm Credit Serv. of Mid-America v. Department of State Revenue*, 705 N.E. 2d 1089 (Ind. Tx. Ct. 1999); *In re Petition of Farm Credit of Western New York, et al.*,

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[1] The *1998 Report on the Financial Condition and Performance of the Farm Credit System* published by the Farm Credit Administration notes that the member institutions of the Farm Credit System "continued to reflect strong financial performance, particularly in earnings and growth." The Direct Lender Associations (PCAs, Agricultural Credit Associations and Federal Land Credit Associations) reported net income of $704 million, up from $521 million in 1994. 1 *Farm Credit System Report* 8, 29 (1999).

Docket Nos. 816576, 816605 and 816606 (N.Y. Div. of Tax Appeals 1/13/2000) (RIA State and Local Taxes).

REASONS FOR DENYING THE WRIT

A.

CERTIORARI SHOULD NOT BE GRANTED WHERE THE SAME QUESTION IS CURRENTLY BEFORE THE COURT

Certiorari should not be granted in this case because the same issues are currently before the Court in *Director of Revenue v. CoBank, ACB,* No. 99-1972 (*cert. granted,* 6/26/00). The resolution of that case should be dispositive of the question presented here where: (a) the tax immunity afforded to Banks for Cooperatives, 12 U.S.C. § 2134, is identical to the immunity provided for PCAs, 12 U.S.C. § 2077; (b) the legislative history of the two statutes is identical, and (c) the PCAs and the Banks for Cooperatives share a common purpose, structure and relationship to the federal government. Further review of the question presented here for PCAs should be unnecessary. Alternatively, the Court should stay action on this Petition until a decision is rendered in Cause No. 99-1972, at which time certiorari should be granted for the purpose of affirming the decision of the court below.

B.

CERTIORARI SHOULD NOT BE GRANTED WHERE THE COURT BELOW CORRECTLY DETERMINED THAT CONGRESS' INTENT TO SUBJECT PCAs TO STATE INCOME TAX WAS CLEAR, OBVIATING THE NEED FOR IMPLYING AN IMMUNITY UNDER *McCULLOCH v. MARYLAND*

The court below correctly held that Congress had expressed its intention to allow state taxation of privately-held PCAs, eliminating any need to apply a separate implied immunity analysis under *McCulloch v. Maryland*. Petition, p. 13a. Because the decision of the New Mexico Court of Appeals is correct in its reasoning and result, certiorari is unnecessary.

1. Where a Limited Immunity is Established by Statute, No Broader Immunity Should Ordinarily be Implied

Because Congress has explicitly addressed the question of how much immunity should be provided to PCAs, this Court should assume, in the absence of evidence to the contrary, that Congress intended to afford just that much immunity from taxation and no more. "[M]atters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 85 (1994). "*Inclusio unius, exclusio alterius*. . . . To create additional 'federal common law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* at 86-87.

The principle that additional preemption should not be inferred where Congress has spoken has particular

application to state taxation. *See, Department of Revenue of Oregon v. ACF Industries, Inc., et al.*, 510 U.S. 332, 345 (1994) ("When determining the breadth of a federal statute which impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope."); *Rockford Life Insurance Co. v. Ill. Dept. of Revenue*, 482 U.S. 182, 191 (1987) ("A court must proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly established."). *See also, National Private Truck Council v. Oklahoma*, 515 U.S. 582 (1995) (federal statutes are construed against the background presumption of non-interference with state taxation).

In the present case, Congress' intent to allow state taxation is evident not only from the express preemption in 12 U.S.C. § 2077, which is limited to taxation of bonds, notes and debentures, but from the history of that statute and the background of the PCAs as well. From their inception, the PCAs (and Banks for Cooperatives) were never afforded the degree of immunity afforded the Federal Land Banks and other components of the Farm Credit System. The broad immunity from state taxation, in the (repealed) second sentence of § 2077, which was provided to the PCAs was always contingent on a federal ownership interest. The (repealed) third sentence of § 2077 phased out the broad exemption upon PCAs' becoming privately owned. When both the contingency and the exemption were removed in 1985, Congress was presumably aware that privately-held PCAs had been held subject to state taxation, *see, e.g., Woodland Production Credit Ass'n v. Franchise Tax Board*, 37 Cal. Rptr. 231, 233 (Ct. App. 1964), yet Congress did not retain the broad

exemption from tax in the second sentence of § 2077, which would have re-established immunity for the privately-held PCAs. The contemporaneous record of the 1985 legislative changes indicates Congress intended to make only "technical and conforming" changes to the statute, not a reversal of fifty years of tax policy. Finally, the explicit income tax exemption which Congress provided to Farm Credit Banks and Federal Land Bank Associations removes any doubt as to what Congress intended. *Smith v. U.S.*, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute."). The court below correctly relied on this overwhelming evidence of congressional intent to conclude that there was no room to engraft a doctrine of implied immunity under the Supremacy Clause to reach a contrary result.

2. PCAs Are Not So Closely Connected to the Federal Government as to Require a Presumption of Immunity from State Taxation.

In *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), this Court ruled that PCAs were not sufficiently close to the federal government to fall within the exception from the Tax Injunction Act afforded to the federal government. "An instrumentality of the United States can enjoy the benefits and immunities conferred by *explicit statutes*, however, without the further inference that the instrumentality has all of the rights and privileges of the National Government." *Id.*, at 829 (emphasis added). After listing the various tests employed by the courts for determining whether a particular entity may sue to enjoin state taxes in federal court, this Court held

that the PCAs met none of them. *Id.*, at 831. The PCAs' business purpose was making commercial loans, they were privately-owned, and they did not exercise powers analogous to federal departments or regulatory agencies. *Id.* at 831-32. There is no reason to adopt a different analysis when determining whether the PCAs should now enjoy an implied, constitutional immunity from taxation under *McCulloch*.

The result in *Farm Credit Services* is consonant with the established rule that courts are not bound by statutory labels when discerning the constitutional rights or obligations of the government. *See, e.g., Lebron v. Nat. R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Amtrak an arm of the government for the purposes of the First Amendment despite its statutory designation-as a private corporation); *Andrews v. Federal Home Land Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993) (Federal Land Bank not an arm of the government for the purposes of the First Amendment despite its statutory designation as an instrumentality of the United States). *See also, Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44-45 (1994) (for purposes of Eleventh Amendment immunity, statutory characterization of entity is only one factor in analysis).

With regard to PCAs in particular, the courts have generally treated them like private parties, and not the government, on a host of issues. *Hanna v. Federal Land Bank Ass'n of Southern Illinois*, 903 F.2d 1159 (7th Cir. 1990) (PCAs subject to jury trials); *In re Hoag Ranches*, 846 F.2d 1225 (9th Cir. 1988) (PCAs are not afforded the government's extended period of time to file a notice of appeal); *Waldschmidt v. Iowa Lakes Production Credit Ass'n*, 380 N.W.2d 704 (Iowa, 1986) (PCAs are not protected by the

Federal Tort Claims Act); *Tooke v. Miles City Production Credit Ass'n*, 763 P.2d 1111 (Mont. 1988) (same); *U.S. v. Haynes*, 620 F.Supp. 474 (D. Tenn. 1985) (indictment against PCA employee for engaging in a conflict of interest with the federal government dismissed because PCA was not the federal government).

The concept that instrumentalities like the PCAs should not automatically be treated as the federal government itself is reflected in this Court's modern intergovernmental immunity cases. Both explicitly and implcitly, the Court has drawn a distinction between state taxes imposed directly upon the United States, for which an express waiver of immunity has been required, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989), and taxes imposed on federal instrumentalities. In the latter situation, this Court has looked to the content of the legislation creating the instrumentality and the nature and governmental purpose of that instrumentality. *U.S. v. New Mexico*, 455 U.S. 720, 735 (1982) ("[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.").

The Petitioner cites *Mayo v. United States*, 319 U.S. 441 (1943) to support its contention that immunity for instrumentalities is automatic. The holding in *Mayo* does not conflict with the decision below; in fact *Mayo* supports it. In *Mayo*, the United States Department of Agriculture was subject to a direct tax upon its property. In striking down the tax, this Court drew a distinction between state taxes laid directly upon the government, for which

express consent was required, and taxes laid upon federal instrumentalities, for which it was appropriate to consider the context of the legislation and purpose of the instrumentality:

> The silence of Congress as to the subjection of its instrumentalities, *other than the United States*, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. [citation omitted] But where, as here, the governmental action is carried out by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

319 U.S. at 447-48. (emphasis added).

The case of *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928) cited by the *Mayo* Court is also instructive. In holding that the Secretary of Interior lacked the implied authority to confer immunity from state royalty taxes on land purchased for Indians from Indian trust money, this Court wrote: "What Government instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them." 276 U.S. at 578.

In the present case, Congress has specified that the PCAs are instrumentalities of the federal government, but it does not follow that the PCAs are the government itself. They are hybrid creatures at best, performing some limited functions which government might otherwise carry out, but organized for private profit. There is no

compelling reason why an immunity from taxation must be inferred for such entities.

CONCLUSION

For the reasons set forth above, Respondent prays for an order denying certiorari in this case, or alternatively, for an order granting certiorari and affirming the decision of the New Mexico Court of Appeals.

Respectfully submitted,

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(3)

No. 00-156

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IN THE

Supreme Court of the United States

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,

Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of New Mexico

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REPLY TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Petitioner Production Credit Association of Eastern New Mexico has no parent corporation and no shareholders are publicly traded companies.

REPLY TO BRIEF IN OPPOSITION

Petitioner Production Credit Association of Eastern New Mexico ("PCA") submits this reply to make two simple points.

First, Respondent Taxation and Revenue Department of the State of New Mexico ("Department") asserts in its Brief in Opposition that PCA made a "misstatement of fact" by contending that if the decision of the New Mexico Court of Appeals stands, there will be retroactive tax liabilities for production credit associations. Br. in Opp. at 5. The Department adds that there is nothing in the record to support this statement, and that it is "highly speculative." *Id.* The Department's assertions are demonstrably incorrect.

In its Motion for Leave to File Brief as *Amicus Curiae* in the New Mexico Supreme Court, the Production Credit Association of New Mexico stated that for the years 1995-1998 it had not paid New Mexico corporate income tax because it was immune from such taxation for the reasons relied upon by PCA below and in this Court. Motion at 2-3. The motion further stated that the *amicus* was concerned that the Department would pursue it for such taxes, penalty and interest if PCA did not prevail. *Id.* at 2. That concern was justified. On May 11, 2000, a mere eleven days after the New Mexico Supreme Court denied PCA's Motion for Rehearing, the Department sent the Production Credit Association of New Mexico a letter instituting an audit for New Mexico corporate income taxes for the years 1994-1998. *See* Appendix. Contrary to the Department's assertions, therefore, it was neither a "misstatement of fact" nor "highly speculative" for PCA to suggest that the decision below, if

allowed to stand, would subject other production credit associations to substantial retroactive tax liabilities.

Second, as the Brief in Opposition makes clear, Respondent agrees with PCA that the Court should hold the petition pending the final decision in *Director of Revenue v. CoBank, ACB*, No. 99-1972, and should then act on the petition in a manner consistent with that decision. Accordingly, while PCA believes that the Department's substantive legal arguments are seriously flawed, there is no need to respond to those arguments because the Department agrees that the petition should be held in any event.

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APPENDIX

STATE OF NEW MEXICO
TAXATION AND REVENUE DEPARTMENT

AUDIT & COMPLIANCE DIVISION–TAX COMPLIANCE BUREAU
5301 Central Ave., NW P.O. Box 8485
Albuquerque, New Mexico 87198

May 11, 2000

Albuquerque Production Credit Association
PO Box 3694
Albuquerque, NM 87190

RE: New Mexico ID Number 01-504162-000

Dear Taxpayer:

An examination of your Corporate Income and Franchise Taxes for tax years 1994, 1995, 1996, 1997 and 1998 indicates you may have underreported taxable income for these periods. Therefore, your company has been selected for a desk audit. Please provide the following information:

- Copies of Federal form 1120, pages 1 though 4, for tax year 1998.
- A copy of the Income and Expense Summary worksheet for tax year 1998.
- A brief description of the nature of your business.

Also, the 1991 and 1992 NM CIT returns indicate deductions of $96,406 and $49,369 for interest from obligations of the U.S. Government. Please provide brokerage statements or bank statements, or other documentation showing this interest to be from obligations of the United States.

It is important that you respond to the below requests within 30 days. Failure to do so will result in assessment of tax

penalty, and interest based on available information for tax years 1994, 1995, 1997 and 1998.

Thank you for your assistance in this matter. If you have any questions, please contact me at (505) 841-6323.

Sincerely,

/s/ Dan Armer
DAN ARMER

Corporate Income Tax Auditor